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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-727

ALFONSO J. CERVANTES,
Petitioner,

vs.

TIME, INC., and DENNY WALSH,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

The petitioner Alfonso J. Cervantes respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in this proceeding on July 20, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 464 F.2d 986 and appears in the Appendix, *infra*, p. A-1. The

memorandum opinion of the District Court for the Eastern District of Missouri is reported at 330 F.Supp. 936 and also appears in the Appendix, *infra*, p. A-16.

JURISDICTION

The judgment of the Court of Appeals was entered on July 20, 1972. A timely petition for rehearing en banc was denied on August 17, 1972, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a newsman-defendant in a civil libel suit has a First Amendment privilege to withhold the identity of claimed sources of key information; and, if so, does the privilege extend to the identity of employees in the United States Department of Justice who are said by the newsman to have unlawfully "leaked" the key information from governmental files not available to the public.

2. Whether a publisher who proclaims that his publication is a report of his year-long investigation of the facts should, for purposes of malice, be held to know what a reasonable investigation would have disclosed.

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT I: Congress shall make no law . . . abridging the freedom of speech, or of the press.

STATEMENT OF THE CASE

Petitioner, the elected Mayor of the City of St. Louis, Missouri, brought this suit for defamation in the District Court pursuant to the diversity provisions of 28 U.S.C. § 1332.

The suit is based both on the feature article of the May 29, 1970, edition of Life magazine and on the pre-publication press release dispatched by Life to the news and electronic media to herald its coming.[1] Respondent Time, Inc. owns and publishes Life magazine and respondent Denny Walsh authored the feature article.

The article is titled "Investigative Report: St. Louis—The Mayor, The Mob and The Lawyer". Its dominant theme (and that of the press release) is the charge that petitioner "has business and personal ties with the gangsters that operate in his city". Petitioner contended that respondents maliciously complemented this false charge with four more defamations, and then endowed the lot with undeserved believability by falsely trumpeting that they "spent a year investigating" before publishing their "report" of "A New Life Investigation".

Respondents asserted that their publications concerned matters of public interest, were made in good faith and without malice, and were federally protected by the First and Fourteenth Amendments.

The article begins with the assertion that in April, 1970, a federal "strike force" was sent to St. Louis to combat "organized crime"; and in January, 1970, petitioner appointed Mr. Morris Shenker, a prominent local attorney, as Chairman of a newly formed St. Louis Crime Commission. Petitioner and Shenker declared that the Commission would seek public support to alleviate the street and

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[1] At petitioner's request the Clerk of the Court of Appeals for the Eighth Circuit has sent a certified transcript of the record herein to the Clerk of this Court. Included is the three volume printed Appendix filed in the Court of Appeals. References to that Appendix will be designated "(A. Vol. ...., p. ...)". References to the Appendix attached to this Petition will be designated "(Appendix, *infra*, p. ...)".

A reproduction of the May 29, 1970, edition of Life appears at A. Vol. III, Tab No. 1; and a copy of the pre-publication press release appears in the same volume, Tab No. 30.

ghetto crime that made people afraid to walk the streets of St. Louis.[2]

Life labeled Shenker "the foremost lawyer for the Mob in the U.S." and concluded that his appointment, coupled with the failure of the Commission to take on organized crime, made the St. Louis crime fight "phony" or "two-faced" (A. Vol. I, p. 159).[3] According to Life, appointing Shenker Chairman of the Commission constituted a "tie" between petitioner and the underworld.[4]

The other "tie" to the underworld that Life attributed to petitioner was said to be provided by Mr. Anthony Sansone, his friend of long standing, campaign manager and, on occasion, his business associate. Mr. Sansone was described as a "socially prominent real estate and insurance man". He is also, as Life said, the son-in-law of James Michaels.

Michaels was described as a notorious gunman and gang leader who is engaged in gambling and bookie operations, runs the "Syrian Mob" as an ally with the St. Louis Mafia headed by Anthony Giardano, and is the most "effective

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[2] This Commission was created by local ordinance for just that purpose. The ordinance designated Circuit Court Judges, prosecuting attorneys and key Aldermen to be members. Petitioner appointed college professors, insurance executives, a former U. S. Attorney and leaders in juvenile correction. All served without compensation except the Executive Secretary. Petitioner appointed former Chief of Police Curtis Brostron to that post. Respondent Walsh called him "impeccable" (A. Vol. I, p. 166).

[3] By law, the police force of St. Louis is completely controlled by a Board of Police Commissioners appointed by the Governor of Missouri. The Mayor of St. Louis is an ex officio member. He has no law enforcement power except the prosecution of the likes of traffic violations, after arrest by state police.

[4] About 65% of the eight-page article is devoted to Shenker's criminal law practice and complex business interests. Petitioner was not said to and did not have any significant connection with them.

entrepreneur" of the Mob in politics and legitimate business. Sansone was labeled "the Mayor's liaison" with these mobs, especially with Michaels.

To back up its theme that petitioner has business and personal ties with gangland, Life charged that on three occasions he consorted with Michaels through Sansone. A fourth libel declared in the following words that Michaels wrote insurance through petitioner:

> "Indeed, mobster Jimmy Michaels himself wrote insurance through Cervantes' firm until 1962 when a new law authorized the state to refuse a brokerage license to anyone who had been convicted of a felony. That supposedly finished Michaels' insurance career, although he was, by all accounts, a persuasive salesman while it lasted."

Miss Janice Pikey, a young Life investigator, provoked this defamation. In January, 1970, at the Missouri Division of Insurance in Jefferson City, she saw that on Michaels' 1962 application to renew his broker's license he listed Cervantes' agency as one of three to receive a copy of his license, if renewed.[5] She also saw that on April 20, 1962, Mr. T. B. Stegeman, head of the Brokers Division, sent a form letter to the three agencies listed. In essence,

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[5] A copy of this application is included in the Appendix, Volume III, Tab No. 29. The pertinent part reads:

> 9. I UNDERSTAND THAT I MAY NOT PLACE ANY BUSINESS WITH AGENTS OR DOMESTIC COMPANIES WITH WHOM I HAVE NOT FILED A COPY OF MY CURRENT BROKER LICENSE. Please issue duplicate copies of my broker license, if granted, to be filed with the following domestic companies or licensed agents: (Duplicate copies are 25¢ each)

Name	Address
Webbe-Brine Insurance	2110 South 39th St., St. Louis, Missouri
Bland & Company	319 North 4th St., St. Louis, Missouri
Cervantes-Cobb-Walsh Gen. Ins. Agency	3910 Lindell Blvd., St. Louis, Missouri

the letter sought verification of whether Michaels had brokered any business with these agencies during the preceding year and, if so, directed that a detailed transcript of such business be returned.[6] All three agencies answered. Two returned a transcript of insurance Michaels had brokered with them with all the details requested. Mr. George Heckman, Vice-President of the Cervantes' agency, replying for it, returned the letter after writing on it: "Mr. Stegeman. We have nothing for this man at present. Understand he wants to broker business with us."

Miss Pikey then interviewed Mr. Jack L. Clay and Mr. T. B. Stegeman, President and Vice-President respectively of Continental Security Life Ins. Co. in Jefferson City. In 1962, Mr. Clay was Superintendent of Insurance, the highest ranking official in the Missouri Division of Insurance. It was by his authority that Michaels' application for license renewal was rejected, as the article stated.

The Affidavits of Messrs. Clay and Stegeman show that during their thirty-minute interview with Miss Pikey they told her that Mr. Heckman's handwritten answer meant that Michaels had *not* written insurance through Cervantes "and it was so understood by the Division of Insurance" (A. Vol. II, pp. 494, 497). They also told her that listing agencies to receive a copy of his license, if renewed, did *not* mean that a broker had done business with those agencies. (Under Missouri law an agency cannot deal with an unlicensed broker.)

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[6] The letter appears in the Appendix, Volume III, Tab No. 16. The relevant text states:

> "The applicant has stated that he has brokered business through your agency in the past twelve months. Please verify this information and if true, furnish a complete transcript of this business to read as follows:
>
> Name of the Insured, Title of coverage,
> Amount of premium, Date of policy,
> Face amount of policy."

Miss Pikey thought "some girl", who was a secretary or clerk, told her that listing agencies on an application meant that the applicant had brokered insurance with them. She did not know this girl's name nor could she describe her (A. Vol. I, pp. 221-222).

The Affidavit of Mr. George Heckman, based upon an exhaustive inspection of Cervantes agency's records as far back as 1959, shows that Michaels had never brokered one policy of insurance through a Cervantes' agency, nor had he been paid one cent of commission.[7]

It is admitted that no one at Life had so much as seen or heard of a single policy of insurance that Michaels brokered through Cervantes.

When questioned about aggravating this falsehood by adding that Michaels "was, by all accounts, a persuasive salesman while it lasted", Walsh said Senior Editor Sackett put that in (A. Vol. I, pp. 186-187) and it referred to the insurance Michaels wrote through Bland! (A. Vol. I, pp. 188-189).[8]

To show that petitioner had "personal ties" with gangland, Life published and its press release repeated:

> "Although Cervantes has a steady liaison with the St. Louis underworld through Sansone, he has been fairly discreet about fraternizing personally with top-level hoodlums. One exception was a gathering at Sansone's home following the funeral of Jimmy Michaels' wife in 1967. In attendance were the royalty

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[7] The Heckman Affidavit is set out in the Appendix, Volume II, page 498.

[8] In the recent book "Payoff" by Michael Dorman, published by David McKay Company, Inc., 1972, the author reviewed the Life article as stating that when Michaels was denied a license, he was "forced to give up a lucrative affiliation with Cervantes's firm". (Page 31)

> of organized crime in St. Louis: Mafia boss Tony Giardano, his underboss John Vitale, Buster Wortman of East St. Louis, Mafia lieutenant Shorty Caleca and a dozen others. Also there, helping his friend Sansone tend bar for the guests, was the mayor."

Walsh said he based this on a copy of a confidential report from the files of the United States Department of Justice.[9] It is a report of an unknown informer—who also said Mr. Stanley Musial attended this get-together.

Walsh knew far more than the bare contents of the informer's report. In January, 1968, when he was a reporter for the St. Louis Globe-Democrat newspaper, he tried to publish the same story there. When the publisher learned that Walsh had never spoken to one person who would verify the Mayor's presence at this get-together, both the Mayor and Sansone were called and their conversations recorded on tapes which Walsh took with him to Life magazine.

Sansone said that over one hundred people came to his home that day and he vehemently denied that petitioner was one of them. Petitioner positively and vehemently denied being at this get-together, telling the publisher that he attended the funeral Mass for Mrs. Michaels and then went immediately to his office at the City Hall to meet with Mr. Joseph Griesedieck and others. Walsh was present when the publisher of the paper taped his conversation with Mr. Stanley Musial who denied being at the Sansone home. The Affidavit of publisher Bauman states that since Walsh did not know of a single person who could verify his story, when this was balanced against the positive denials of petitioner, Sansone and Mr. Musial, "responsible journalism required that the article should

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[9] A copy of this report is included in the Appendix, Volume III, Tab No. 4.

not be published and the Globe-Democrat did not publish it" (A. Vol. II, p. 492).

For the next two years, Walsh made no effort to verify this story—except for one highly significant matter. He directed Mr. Ralph Salerno, one of Life's investigators, to call on Mr. Griesedieck in St. Louis and find out whether he met with the Mayor at his office on the morning of this incident. *When Salerno reported that Mr. Griesedieck verified this meeting, Walsh ended his investigation of the Mayor's whereabouts then and there.* No reason was offered for aborting Salerno's investigation.

After suit was filed, respondents requested and received a copy of petitioner's official appointment book for the day in question. It documents the Mayor's whereabouts hour by hour and names the people who were with him. It was physically impossible for petitioner to have been at the Sansone home that day.

Confronted with all this, Walsh claimed that shortly before publication he called his "people" in the Department of Justice, asked them to "check" on the informer's reliability, and they reported that he is considered reliable by the Department of Justice. He refused to name these "people", citing as one reason his fear that they would be reprimanded or lose their job (A. Vol. I, pp. 31-32, 40). He also asserted a nontestimonial privilege under the First Amendment and a New York State Statute.

Throughout his deposition, when Walsh claimed to have received information from employees in the Department of Justice, he was called upon to identify them and refused for the above reasons.

To back up its accusation that petitioner was "tied" to Michaels through Sansone, Life stated:

> "Through Sansone, Cervantes has sought and received the counsel of this powerful gang leader. In December 1964, just two days after Cervantes declared his candidacy for mayor, he met with Sansone and Michaels to plan campaign strategy. The meeting took place in the offices of Rite Way Cigarette Sales, a Mob-controlled vending machine firm, incorporated, incidentally, by Attorney Morris Shenker."

To support this defamation Walsh produced another of what he said was a copy of a confidential report out of the files of the Department of Justice.[10] Michaels and Sansone were positively identified. Petitioner was called "an individual believed to be Al J. Cervantes". No conversation was reported.

Walsh admitted that from the way this report was worded he had doubt as to whether it was petitioner who was present (A. Vol. I, pp. 140-141); he admitted also that the report said nothing about meeting "to plan campaign strategy" or that petitioner "has sought and received the counsel of this powerful gang leader." Walsh claimed that in January, 1969, four years after the event covered in the report, he asked his "people" in the Department of Justice to verify Cervantes' identity. They not only did that, they "volunteered" that petitioner sought Michaels' counsel in planning campaign strategy (A. Vol. I, pp. 31-32).

Petitioner's Affidavit shows he has never been in the offices of Rite Way, and has never sought or received counsel from or planned campaign strategy with Michaels either alone or with Mr. Sansone (A. Vol. II, p. 510).

Mr. Sansone's Affidavit shows that he has never brought petitioner and Michaels together at Rite Way or any other place (A. Vol. II, p. 507).

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[10] This report is included in the Appendix, Volume III, Tab No. 2.

The remaining defamation complained of is of the same genre as the preceding one. Life published:

> "The following March, after Cervantes had won the primary, Sansone met again with Michaels at Rite Way to talk over Cervantes' prospects for the general election. This time Giardano, the Mafia boss, sat in too."

Again, Walsh claimed this defamation was based on "a Government report and conversations . . . with employees of the Justice Department" (A. Vol. I, p. 144).[11] The "report" shows it is based on a memorandum prepared by Sgt. Ed Schaaf of the Intelligence Unit of the St. Louis Police Department, dated March 26, 1965.

Walsh admitted that this report was silent about two things that he published: it did not say that Sansone participated in any conversation, and it did not say that he "met . . . to talk over Cervantes' prospects for the general election".

Again, four years after the event, Walsh claimed he called his "people" in the Department of Justice: ". . . I especially wanted to know if Mr. Sansone was participating in the conversation" (A. Vol. I, p. 150). They checked and said that he was and the conversation was about Cervantes' chances in the coming general election (A. Vol. I, p. 147).

Sgt. Schaaf reviewed the original report he filed with the St. Louis Intelligence Unit and averred that Sansone was walking out the door as he entered Rite Way and, when he overheard mention of the coming election, Sansone was gone. Moreover, the Mayor's election was not

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[11] The report is included in the Appendix, Volume III, Tab No. 3.

mentioned.[12] Sansone emphatically denied ever discussing petitioner's election with Michaels or Giardano.

The depositions of Life's editors who assisted in the preparation of the article revealed that their job was confined to screening the article's rhetoric. None had investigated, and none claimed to know the facts; each professed a good faith belief in the truth of the libels based solely upon Walsh's representations.

The deposition testimony of Mr. Thomas H. Flaherty, Jr., head of the Investigative Department, is typical of the others. He did none of the investigating. Along with the others, he decided on the choice of words. If he had known that Michaels' application for broker's license did not contain a declaration that he had written insurance through Cervantes, he would not have approved that part of the article (A. Vol. II, pp. 253-254, 258). He was not told of the Stegeman letter and the replies (A. Vol. II, pp. 254-255). He approved publishing that Michaels was "by all accounts a persuasive salesman" based solely on Walsh (A. Vol. II, p. 259).

If Mr. Flaherty had known that Walsh's Government "report" positively identified Michaels and Sansone but said that Sansone was accompanied by a man "believed to be Al J. Cervantes", it would have created enough doubt to be worthy of checking on (A. Vol. II, pp. 274, 277).

In wording the article to state that Sansone met with Giardano and Michaels at Rite Way to talk over Cervantes' election prospects, Walsh said this was confirmed by "Government surveillance" (A. Vol. II, p. 284).

Flaherty approved publishing that petitioner tended bar for the hoodlums at Sansone's home because Walsh

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[12] Twenty-eight nominees were seeking fourteen Aldermanic seats in the same election.

said it was based on "Government surveillance" or "a Government report" (A. Vol. II, pp. 288-290). He did not say it was an "informer's report" (A. Vol. II, pp. 290-291). Walsh did not tell him that the Mayor vehemently denied being there (A. Vol. II, p. 291) and that Sansone denied the Mayor's presence (A. Vol. II, pp. 292). If he had done so, they "would have discussed the full picture of the denials" (A. Vol. II, p. 291). Nor did Walsh tell him that the St. Louis Globe-Democrat rejected the identical story when Walsh was a reporter for that newspaper (A. Vol. II, p. 292). If he had done so, "we would have discussed the further circumstances of the situation" (A. Vol. II, p. 293). Walsh did not tell him that Mr. Salerno verified that petitioner met at his office with Mr. Griesedieck and others immediately after the funeral Mass (A. Vol. II, pp. 295-296).

Respondents have never explained why Salerno's investigation was ended. Petitioner suggested to the courts below it was because Walsh feared that Salerno was but one small step from proving the falsity of what he was bent on publishing.

It is admitted that the article did not contain "hot news"; and Life had ample time to check for accuracy. The publication of any falsehood was not due to the pressure of time, or the need to publish the article in the May 29, 1970, issue (A. Vol. II, pp. 449-450).

Petitioner also took the deposition of Mr. William G. Hundley, an attorney of record for respondents. Mr. Hundley had fifteen years experience in the Department of Justice, seven as Chief of the Organized Crime Section. A few days before the article was closed respondents asked him to "authenticate" the "confidential Government documents that Walsh had" (A. Vol. II, p. 390). Walsh had about a file cabinet full of "authentic FBI reports" which "certainly were confidential documents"

and were so stamped (A. Vol II, pp. 390-391, 407). He also had reports from Internal Revenue Service which were for interdepartmental use only (A. Vol. II, pp. 392-393).

Mr. Hundley testified that Department of Justice employees who gave Walsh copies of confidential reports, or told him what was in the files, did so in violation of Department regulations and their oath of office (A. Vol. II, pp. 391, 393-394, 399); and the Department of Justice would be better off "if it could weed out" those who turn over confidential information to private sources (A. Vol. II, pp. 402-404) because they have "performed a disservice to the Department" (A. Vol. II, p. 405).

The Proceedings Below

Petitioner filed his motion to compel Walsh to disclose the names of the Department of Justice "people" who supposedly "checked" confidential Government files in order to supply Walsh with what he needed for three of the libels. The motion averred that given the identity of these "people", petitioner could bring to light material evidence bearing upon respondents' malice; that such discovery would disclose (1) whether or not Walsh got any information from these "people" and, if so, (2) whether they gave him information he claimed, or (3) gave him other information that alerted him to falsity. The motion averred, also, that only by such compelled disclosure could petitioner learn the identity of these alleged "people".

Respondents filed their motions for summary judgment soon thereafter. Petitioner protested that under Rule 56 (f), Fed.R.Civ. P., the motions were not ripe for adjudication until he had completed the discovery sought in his motion to compel. The District Court sustained respondents' summary judgment motions and, because it did,

deemed it unnecessary to rule on petitioner's motion to compel (Appendix, *infra*, p. A-24).

The three judge panel of the Eighth Circuit found that the record material failed to show malice with "convincing clarity"; and, absent a "concrete demonstration" that the disclosure of Walsh's sources would lead to "persuasive evidence" of malice, Walsh was held to have a First Amendment privilege to withhold the identity of his claimed sources. Accordingly, the District Court's grant of summary judgment in favor of respondents was affirmed (Appendix, *infra*, p. A-15) and petitioner's petition for rehearing and, in the alternative, for rehearing en banc was denied (Appendix, *infra*, p. A-25).

REASONS WHY THE WRIT SHOULD BE GRANTED

I

Whether a newsman-defendant in a civil libel suit has a First Amendment privilege to withhold the identity of claimed sources of key information; if so, does the privilege extend to the identity of employees in the United States Department of Justice who are said by the newsman to have unlawfully "leaked" the key information from government files not available to the public.

The three judge panel of the Eighth Circuit has decided an important First Amendment question which has not been, but needs to be, settled by this Court. The panel Opinion has formulated a conditional First Amendment testimonial privilege for newsmen-defendants in civil libel suits. If allowed to stand unreviewed, it will create confusion and uncertainty for newsmen, their sources and the courts.

Moreover, by protecting unlawful activity in the gathering of news, the Opinion has distorted the First Amendment into fostering a disrespect for, and continued violation of, law.

A. Testimonial privilege for newsmen in civil cases.

The Opinion is the first of authority to erect a conditional testimonial privilege for newsmen in civil suits. The condition that will override the privilege is proof of malice with convincing clarity or "a concrete demonstration that the identity of news sources will lead to persuasive evidence on the issue of malice" (Appendix, *infra*, p. A-13).

The Opinion noted that in *Branzburg v. Hayes*, 406 U.S. ..., 92 S.Ct. 2646, this Court did not address the

question whether the First Amendment commands the grant of a newsman's privilege in civil suits. Nonetheless, the Eighth Circuit panel adopted the very rationale this Court rejected in denying newsmen a grand jury testimonial privilege. To condition a privilege, in civil suits, upon a concrete demonstration that malice will be proved with disclosure, has the same defects as conditioning a grand jury privilege upon a showing of a "compelling" or "paramount" interest.

"The practical and conceptual difficulties", pointed out in *Branzburg*, and ignored by the Eighth Circuit panel, are just as applicable in a civil libel suit: neither the reporter, nor his informant would know in advance whether a libel plaintiff might demonstrate that with disclosure he would find evidence of malice; and each judge would be required, under the different circumstances of each case, to make an ad hoc determination (or guess) as to what evidence a plaintiff might? could? must? produce by disclosure that would be "persuasive"—to him or a jury? To the informant "the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem." 92 S.Ct. at 2667.

The practical difficulties of the conditional grant in the case sub judice are immense. To require proof of malice before discovery is a classic example of putting the cart before the horse. To require a "concrete demonstration" that identity of sources would produce "persuasive evidence" of malice is almost as illogical. How is it to be demonstrated that undiscovered evidence will be persuasive? For example, petitioner does not accept as true Walsh's claims that Justice Department employees "checked" and then told him essential things without which three of the libels could not have been published in good faith. Petitioner contends that Walsh fabricated both the material and Government employees as its source. This contention is not frivolous: Walsh would convict

these employees of engaging in unlawful conduct[13] in order to pass false information, three to five years after the event, all tailored to his precise need.[14]

The Eighth Circuit panel did not deem this enough to override the conditional privilege; and left unanswered whether it fell short of a "concrete demonstration" or whether evidence of fabrication would not rise to "persuasive evidence" of malice. This Court declared in *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968): "Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant. . . ."

A conditional privilege in civil suits, no less than in the grand jury context, would "embark the judiciary on a long and difficult journey" to determine when and under what circumstances it would be applicable. The birthplace for a nontestimonial privilege is in the legislative branch. Missouri has chosen not to enact a newsman's statute. "The task of judges . . . is not to make the law but to uphold it . . ." 92 S.Ct. at 2669.

It is not unexpected that the novel privilege erected by the panel Opinion would bring its decision into direct conflict with the Second Circuit in *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958), where compelled disclosure of a reporter-witness' sources was affirmed.[15] Had the Opin-

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[13] This will be gone into more thoroughly in the second part of the discussion of this Question.

[14] In each instance petitioner produced hard evidence that such "information" was false. One example of how it was tailored to Walsh's need concerns the unknown informer relied upon to publish that petitioner acted as bartender for the Mob. Confronted with solid evidence of his unreliability, Walsh claimed that three years after the event reported these employees told him the informer was reliable (A. Vol. I, pp. 27-29, 128-129).

[15] The Opinion is in conflict, also, with District Court decisions in *Adams v. The Associated Press*, 46 F.R.D. 439 (S. D. Texas, 1969), and *Brewster v. Boston Herald-Traveler Corp.*, 20 F.R.D. 416 (D.C. Mass. 1957).

ion sub judice approached the *Garland* test and looked to whether the identity of Walsh's sources "went to the heart of plaintiff's claim", it would have reached the *Garland* result of compelled disclosure. Proof that Walsh fabricated both the guts of the libels, and their source, would certainly go to the heart of plaintiff's claim.

The conflict, in principle, with the decision of this Court and the direct conflict with the decision of the Second Circuit justifies the grant of certiorari to review the judgment below. It is justified, also, because a matter of importance to the press and those who will be publicized by it needs to be settled by this Court.

B. **Testimonial privilege for unlawful sources**

The panel Opinion has granted newsmen a nontestimonial privilege to protect (and thereby preserve) unlawful sources of news. Unlawful conduct has never before been tolerated by the First Amendment; and illegitimate news-gathering activity cannot be rationalized into an exception.

In "balancing" the interests involved, the Opinion overlooked that only legal interests are worthy of being weighed against the public's right to every man's evidence. See, e.g., *Blackmer v. United States,* 284 U.S. 421 (1932).

The Opinion's reliance upon statements of this Court in *Branzburg* (when dealing with *Caldwell*) is grievously misplaced. (Appendix, *infra,* p. A-10, n. 9; p. A-11, n. 10; p. A-15, n. 12) It overlooks, completely, that reporters Branzburg, Pappas and Caldwell were engaged in legitimate news-gathering activity. The majority and dissenting opinions were concerned for the right of those reporters to be free of undue harassment and keep their *legitimate* sources of information from being "an-

nexed" by prosecutors.[16] Nothing in those opinions can be said to sanction the protection of unlawful sources of news. No advocate of a reportorial privilege has ever suggested that it include illegitimate news-gathering activities.

This Court, in *Branzburg*, went to considerable lengths to carefully point out that the First Amendment does not give the press "a constitutional right of special access to information not available to the public generally"[17], 92 S.Ct. at 2657. That unassailable principle was supported by a host of citations. See, e.g., *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965); *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 419-420 (1918).

This case also involves the public's stake in the law enforcement objectives of the Department of Justice. The panel Opinion noted Mr. William Hundley's expertise in this matter (Appendix, *infra*, p. A-14, n. 11) but ignored his testimony that the Department would be a better one "if it could weed out" Walsh's informants who do a "disservice" to their Government by violating their oath and the regulations of the Justice Department (A. Vol. II, pp. 402-405).[18]

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[16] The exact opposite is true here. Walsh did not develop his own sources—he "annexed" the Department of Justice.

[17] The Freedom of Information Act, 5 U.S.C. § 552, specifically exempted from the information to be made available to the public certain inter-agency memoranda and investigatory files compiled for law enforcement purposes. § 552 (a)(4), (b)(5), (b)(7).

[18] Executive Order No. 11222, 30 Fed. Reg. 6469 (1965), pursuant to 3 U.S.C. § 301, provides:

> "Section 205. An employee shall not directly or indirectly make use of, or permit others to make use of, for the purpose of furthering a private interest, official information not made available to the general public."

The regulations of the Department of Justice provide:

> "Improper Use of Official Information.
>
> No employee shall use for financial gain for himself or for another person, or make any other improper use of, whether

Fair play and fundamental concepts of justice are also involved. "Investigative files often contain hearsay, gossip, and other remote information from which the government hopes to develop leads. Public disclosure of such trivia and possible falsehoods might work grave injury and injustice to those involved." (Quoted at *8 Wigmore, Evidence,* § 2378 (McNaughton rev. 1961), pp. 807-808). Indeed, as pointed out in the dissent of Mr. Justice Douglas in *Caldwell,* the power of Government is a "power to suffocate both people and causes. Those in power, whatever their polities, want only to perpetuate it." 92 S.Ct. at 2693. Justice Douglas was, of course, referring to the power of Government to retaliate against the press. The same power of the "ins" can also be used to destroy their political opponents by subtly "leaking" to friendly reporters some of the raw, unverified, unevaluated, hearsay information that finds its way into Government investigatory files.[19]

The protection and encouragement given to unlawful conduct in gathering news, and its neoteric sanctuary under the First Amendment, justifies the grant of certiorari to review the judgment below.

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by direct action on his part or by counsel, recommendation, or suggestion to another person, information which comes to the employee by reason of his status as a Department of Justice employee and which has not become a part of the body of public information." 28 C.F.R. § 45.735-10.

Federal Courts take judicial notice of the regulations of the Department of Justice and they "have force of law".

[19] The St. Louis Post-Dispatch reported on March 9, 1971, page 3A, that when the very material involved in this case was brought to the attention of the Senate Judiciary Subcommittee on Constitutional Rights by San Francisco Mayor Joseph Alioto, Attorney General Richard Kleindienst requested Time-Life to return FBI records, including those used in this case.

II

Whether a publisher who proclaims that his publication is a report of his year-long investigation of the facts should, for purposes of malice, be held to know what a reasonable investigation would have disclosed.

Underlying this question is the distinction between the publication of "hot news" and the publication of information of a different kind. Here, Life proclaimed at every turn that its article was an "Investigative Report" and was based upon its "year-long investigation of the situation in St. Louis."

The dictionary defines "investigate": "To follow up by patient inquiry or observation; to inquire and examine into with systematic attention to detail and relationship; . . ." Webster's International Dictionary, 2nd Ed., p. 1306. Hot news, on the other hand, has an immediacy about it that requires its publication while still current and before competition "scoops" it.

Thus, the reporting of hot news, by its very nature, allows little or no time to investigate whereas an investigative report is freed from the pressure of meeting a deadline and, by its very nature, requires a thorough ferreting out of the facts. Life's editor admitted that its article was not hot news, and that any inaccuracies in it were not caused by lack of time or resources.

The distinction between hot news and investigative reports, in the context of libel actions, was drawn by this Court in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker,* 388 U.S. 130 (1967). In *Butts,* Chief Justice Warren emphasized that little effort was expended to investigate the facts in spite of the vehement denials of Coach Butts and he described the magazine's investigation as "slipshod and sketchy." The late Mr. Justice Harlan found liability from evidence showing "an extreme de-

parture from the standards of investigation and reporting ordinarily adhered to by responsible publishers."

Following this Court's lead in *Butts*, the Second Circuit in *Goldwater v. Ginzburg*, 414 F.2d 324 (1969), recognized that a publisher should be held to a stricter responsibility for accuracy when publishing an investigatory report. Similarly, in *Blanke v. Time, Inc.*, 308 F.Supp. 378 (E. D. La. 1970), the District Court perceived the distinction between two kinds of news and thought that the test for malice should gauge the degree of care required before publication by the amount of time and opportunity available. *Id.* at 383 (footnote 10).

Thus, every court confronted with the problem has recognized that a "substandard" investigation may warrant a finding of malice when the publication does not contain hot news. Others have echoed the same concept. In *Hanson, Libel and Related Torts*, Vol. I (1969), published by the American Newspaper Publishers Association Foundation, the distinction is articulated in these words: "Where any publication covers matter other than 'hot news', a stricter responsibility for accuracy is imposed." *Id.* at p. 75. See, e.g., *Reporters and Their Sources*, 80 Yale Law Journal 317 (1970), where it is stated that proof of malice may be made "by showing that a newspaper has deviated substantially from standards of good investigation and reporting'." *Id.* at 361.

Since this Court's decision in *Butts*, the concept of a different standard for proof of malice, when publishing other than hot news, has taken hold. Yet, no guidelines have emerged by which to delineate what standard would still be in compliance with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Thus, lower courts have been left to their own devices, so to speak, to devine when an investigation is "slipshod and sketchy" or constitutes an

extreme departure from the standards of investigation ordinarily adhered to by responsible publishers.[20]

This Court has consistently stated that it will, on a case by case basis, make certain that First Amendment demands are met. The need of both the press and courts for guidance in this important area of libel law justifies the grant of certiorari to review the judgment below.

A subsidiary question arises when a publisher voluntarily, indeed intentionally, goes out of his way to impress upon his readers that he conducted a year-long investigation of the facts before publishing his report. Such self praise is obviously indulged to induce reliance upon the truth of the publication.

This special credibility with which Life endowed its article was "ideologically neutral" in that it added nothing to the article's expression of ideas and lacked any informational value for the public.

It is nothing more than self-aggrandizing conduct that falls outside the range of First Amendment protections for free press as defined by *New York Times* and its progeny. Free press would neither be proscribed nor chilled if Life is held to its word.

When once it is recognized that Life's declarations about its investigatory activities do not rise to constitutional proportions, the issue comes into clearer focus. There is no just reason why respondents here should not be held to their word just as every declarant is held to his when he invites others to rely upon it.

Moreover, if respondents are not to be held accountable for their representations, they will receive an unjust en-

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[20] The publisher of the St. Louis Globe-Democrat refused to publish Walsh's story that petitioner was bar-tender for the Mob, because "responsible journalism" would not permit it (A. Vol. II, p. 492).

richment in that Life's public believed what Life claimed for itself. Equitable principles of estoppel are applicable. Either Life should be held to have known what a reasonable investigation would have disclosed or it should be estopped from asserting that its failure to investigate does not constitute proof of malice. A fair reading of the record in this case shows that a minimal investigation of the published libels would have revealed their falsity.

CONCLUSION

If allowed to stand, the Opinion below will create confusion and uncertainty for newsmen, their sources, and the courts; and it will be the first to give First Amendment sanction to unlawful conduct; it also points up important areas in federal supervision of state libel law enforcement that needs to be clarified for the courts and the press. For these and the other reasons stated herein this Petition for Writ of Certiorari should be granted.

Respectfully submitted

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November 15, 1972

Certificate of Service

I hereby certify that on this 14th day of November, 1972, three copies of the Petition for Writ of Certiorari were delivered to Mr. Robert S. Allen, c/o Lewis, Rice, Tucker, Allen and Chubb, Attorneys for Respondent Time,

Inc., 611 Olive Street, St. Louis, Missouri 63101; and to Mr. D. Jeff Lance, c/o Cook, Murphy, Lance & Mayer, Attorneys for Respondent Denny Walsh, 611 Olive Street, St. Louis, Missouri 63101. I further certify that all parties required to be served have been served.

Mortimer A. Rosecan
Rosecan and Popkin
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Attorneys for Petitioner

APPENDIX A

OPINION
OF

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 71-1555

Alfonso J. Cervantes, Appellant,

vs.

Time, Inc., and Denny Walsh, Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: April 11, 1972.

Filed: July 20, 1972.

Before VAN OOSTERHOUT, Senior Circuit Judge, MEHAFFY and STEPHENSON, Circuit Judges.

STEPHENSON, Circuit Judge.

Alfonso J. Cervantes is the mayor of Saint Louis, Missouri. In May 1970 there appeared in appellee's Life magazine an article of 87 paragraphs accusing the mayor of maintaining "business and personal ties with the gangsters that operate in his city." The article was

entitled "The Mayor, The Mob and The Lawyer," and captioned with a comment explaining: "Both the mayor and his new crime commissioner have personal ties to the underworld." The substance of the article describes in some detail the relationship said to exist between Mayor Cervantes, Morris Shenker,[1] a Saint Louis criminal lawyer and then the mayor's appointee "to head [the] newly formed Commission on Crime and Law Enforcement," and Tony Sansone[2] who, according to the article, is "the mayor's liaison with the two mobs that run the St. Louis underworld."

Mayor Cervantes instituted this diversity libel action in the United States District Court for the Eastern District of Missouri seeking $2,000,000 compensatory and $10,000,000 punitive damages. He sought relief against and named as defendants the publisher of Life magazine and the reporter whose investigative efforts produced

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[1] Mr. Shenker is characterized by the article as "the foremost lawyer for the mob in the U.S." "His relations with some of the nation's top hoodlums, Life's investigations show, go far beyond legal representation." The article describes Mr. Shenker as "a brilliant organizer of labyrinthine business and financial schemes which dazzle and befuddle the government," and as one who "would have to do little more than to tell what he already knows about organized crime to go a long way toward breaking its back in St. Louis and several other places as well."

[2] Life has this to say about Mr. Sansone:

> "The man closest to Cervantes, as friend, business associate, campaign manager and unofficial but forceful influence around city hall, is Tony Sansone. A wealthy and socially prominent real estate and insurance man, Sansone is, to begin with, the son-in-law of Jimmy Michaels, a notorious gunman and gang leader whose record goes back to the shooting wars of the '20s in St. Louis. Michaels runs the Syrian Mob, an ethnic gang that coexists these days as an 'ally by treaty' with the Sicilian Mafia family in St. Louis headed by Anthony Giardano. Michaels' general franchise is the gambling and bookie operations in south St. Louis. He is also the most effective entrepreneur in either mob in politics and legitimate business."

grist for the article.[3] He alleged in his amended complaint that 4 paragraphs of the article contained false statements which were authorized, published, and communicated with knowledge of their falsity or, alternatively, with reckless disregard as to their truth.[4] The defendants answered raising both the defense of truth and constitutional privilege.

The mayor undertook extensive pre-trial discovery. He deposed the reporter who testified that he gathered information which formed the basis for most of the story from informants within the Federal Bureau of Investigation and within the United States Department of Justice. He revealed that these informants furnished him copies of confidential reports and orally transmitted additional and supplemental corroboratory information from which he constructed the events embodied in 3 of the 4 disputed paragraphs, but he refused, under repeated questioning, to divulge the names of the individuals from whom he extracted this information. That refusal was bottomed on the theories (i) that to assume a contrary position would be to subject his informants to retaliation or reprisals and physical danger; (ii) that compulsory disclosure of confidential sources would violate the First Amendment's freedom of the press by impeding the dissemination of news which can be obtained only if he,

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[3] The article was published under the reporter's by-line. The record reveals that although ultimate editorial responsibility for the article's content rested with Life's Associate and Managing editors, the reporter shared, with others, draftsmanship duties.

[4] The mayor bases part of his action on the prepublication press release which Life dispatched to herald the coming of the article. The complaint charges that this release was transmitted by the publisher to radio and television stations throughout Missouri and elsewhere to stimulate reader interest. The release invited and authorized the media to announce that the forthcoming issue of Life would report that its years-long investigation disclosed, *inter alia*, that Mayor Cervantes has business and personal ties with the gangsters that operate in Saint Louis.

as a professional journalist, may effectively guarantee anonymity of the source; and (iii) that he, as a professional journalist and as a resident and citizen of the State of New York, possesses a statutory reportorial privilege to withhold the sources of news coming into his possession.[5] The mayor promptly moved for an order to compel disclosure of the identity of the informant[s]. The defendants responded by moving for summary judgment on the ground that each had acted in good faith in publishing the article and that both believed all of the allegedly defamatory statements to be true.

The District Court (The Honorable James H. Meredith, Chief Judge), did not reach the merits of the motion to

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[5] This aspect of the reporter's refusal is rooted in N.Y. Civil Rights Law, § 79-h (McKinney 1970). Subparagraph (b) of the statute provides, in substance, that a professional journalist shall not be adjudged in contempt by any court for "refusing or failing to disclose any news or the source of any such news coming into his possession in the course of gathering or obtaining news for publication or to be published in a * * * magazine * * * * * * * by which he is professionally employed or otherwise associated in a newsgathering capacity." The law of Missouri recognizes no such privilege.

We have been referred to no New York case defining the scope of this statutory privilege. Nor have we found a New York case affording precedent from which we can determine whether the statute draws a distinction based on the context in which the privilege is asserted. But see *People v. Wolf*, 329 N.Y.S.2d 291 (Sup. Ct. New York County 1972), and *In Re WBAI-FM*, 326 N.Y.S.2d 434 (Albany County Ct. 1971).

The scope of discovery permitted by Fed. Rules Civ. Proc. Rule 26(b)(1), 28 U.S.C.A. is limited to matters not privileged. This case presents the somewhat unusual situation where a deposition is being taken in New York for use in an action based on diversity of citizenship pending in a United States District Court sitting in Missouri, and the witness, a citizen of New York, claims a testimonial privilege not recognized in Missouri. In determining the validity of the asserted statutory privilege, a court is faced with the question whether to apply federal law or State law; and, if State law is to control, is it to be applied under the so-called *Erie* doctrine, see *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), or under Fed. Rules Civ. Proc. Rule 43(a), providing, *inter alia*, that evidence shall be admitted if it is admissible under the rules

compel. However, on the basis of a well-developed record consisting of affidavits, depositions, and other documentary evidence, it entered summary judgment for the defendants on the grounds that neither defendant had knowledge of falsity, that neither entertained serious doubts as to the truth of any statement in the article, and that neither acted with reckless disregard for truth or falsity. 330 F. Supp. 936, 940 (1970). This appeal followed.

I

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), it was established that the First and Fourteenth Amendments, protection of speech and the press restrict the

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of evidence in the courts of the State in which the federal court is situate? Once these questions have been resolved, the court must determine whether to apply the law of the trial State or that of the deposition State.

This court long ago adopted the rule, said to comport with the "weight of authority", see *Massachusetts Mutual Life Insurance Company v. Brei*, 311 F.2d 463, 465-66 (CA2 1962), that State, not federal, law is determinative of evidentiary problems arising in a diversity case. See, *e.g., Bennett v. Wood*, 271 F.2d 349, 351 (CA8 1959) (burden of proof); *Severson v. Fleck*, 251 F.2d 920, 923-24 (CA8 1958); and *State Mutual Life Assurance Co. v. Wittenburg*, 239 F.2d 81, 89-90 (CA8 1957) (burden of proof). Similarly, it is well-settled law that a federal diversity court must apply the choice-of-law rules of the State in which it sits, here Missouri. *Klaxon Company v. Stentor Electric Manufacturing Co., Inc.*, 313 U.S. 487, 496 (1941). Applying these rules, we note that Missouri seemingly adheres to the generally accepted principle that the admissibility of evidence is governed by the law of the State where the testimony is to be heard. *Rosser v. Standard Milling Company*, 312 S.W.2d 106, 110 (1958), and *Prentiss v. Illinois Life Ins. Co.*, 225 S.W. 695, 702 (1920). Thus, by this analysis, New York's law as to the testimonial privilege of a journalist does not apply, and the reporter is entitled to no protection on that ground. Compare *Application of Cepeda*, 235 F.Supp. 465 (SD NY 1964). The same result would follow application of the proposed Rules of Evidence for the United States Courts and Magistrates, albeit for different reasons, See 51 F.R.D. 314, 356, 358-60.

enforcement of State libel laws. *Times* accordingly held that a public official may recover damages "for a defamatory falsehood relating to his official conduct" only if he "proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279-80. The holding of *Times* was reaffirmed and the reckless disregard aspect of its actual malice standard amplified in *St. Amant v. Thompson*, 390 U.S. 727 (1968). The Court said with respect to this aspect of the constitutional standard:

> "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." 390 U.S., at 731.

It is clear, finally, that the conditional privilege granted by *Times* to false defamatory expression no longer is confined to statements concerning public officials. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), holds that constitutional protection is to be extended to "all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." *Id.*, at 44. Thus, "the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern." 403 U.S., at 44.

Since the statements in suit are conceded by all to touch and concern issues of public or general concern, it is clear that Mayor Cervantes cannot, absent a showing of actual malice, recover damages under the Missouri law

of defamation.[6] The District Court concluded, and the defendants here suggest, that because substantial editorial effort was expended to secure independent corroboration of the published materials, the mayor cannot meet the applicable constitutional standard of proof.

II

Without question the article fashions a broadside attack on the ability of Mayor Cervantes to perform responsibly in the governmental domain. It directs sharp and coarse comment both toward his official conduct and also his fitness for office. Indeed, the entire thrust of the article's message is that the mayor, despite public pronouncements to the contrary, seemingly possesses substantial personal and business interest in the perpetuation of profitable criminal activity in his city. Yet in the face of this massive attack on his fitness to occupy his important office, the mayor takes issue with but 4 of the 87 paragraphs comprising the article.[7] So far as the vast amount of the other material is concerned, its truth is either admitted or not explicitly denied. Thus, we are

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[6] Various aspects of the Missouri law of defamation have received the careful attention of this court in previous cases. See, *e.g., Ruderer v. Meyer*, 413 F.2d 175 (CA8 1969), certiorari denied 396 U.S. 936; *Underwood v. Woods*, 406 F.2d 910, 915 (CA8 1969); *Walker v. Pulitzer Publishing Co.*, 394 F.2d 800 (CA8 1968); *Pauling v. Globe-Democrat Publishing Co.*, 362 F.2d 188 (CA8 1966); certiorari denied 388 U.S. 909; and *Riss v. Anderson*, 304 F.2d 188 (CA8 1962). The Missouri law recognizes a qualified privilege in the news media to comment on matters and persons of public concern so long as the account is fair and not actuated by malice. See *e.g., Moritz v. Kansas City Star Co.*, 258 S.W.2d 583 (1953). This privilege is an affirmative defense which must be proven by the defendant. *Walker v. Kansas City Star Co.*, 406 S.W.2d 44 (1966). See also *Pulliam v. Bond*, 406 S.W.2d 635 (1966).

[7] In his Reply Brief on this point the mayor asserts that most of the other material did not pertain to him. In the light of Mayor Cervantes' relationship with Commissioner Shenker, however, a fair reading of the record leaves us with the contrary inference.

concerned here with only the comparatively few words said by the mayor to be false and defamatory, and as to these, he acknowledges that the burden is his to establish with "convincing clarity" deliberate or reckless error. *Times, supra,* at 285-86.

Central to the mayor's appellate attack is his contention that he cannot possibly meet his burden of proof if the reporter is allowed to hide behind anonymous news sources. He argues that in a libel case of this kind the identity of a reporter's sources is absolutely essential to the successful outcome of the lawsuit. His arguments in favor of compulsory disclosure may be summarized as follows: [a] disclosure enables the plaintiff to scrutinize the accuracy and balance of the defendant's reporting and editorial processes; [b] through disclosure it is possible to derive an accurate and comprehensive understanding of the factual data forming the predicate for the news story in suit; [c] disclosure assists successful determination of the extent to which independent verification of the published materials was secured; and [d] disclosure is the sole means by which a libeled plaintiff can effectively test the credibility of the news source, thereby determining whether it can be said that the particular source is a perjurer, a well-known libeler, or a person of such character that, if called as a witness, any jury would likely conclude that a publisher relying on such a person's information does so with reckless disregard for truth or falsity. Moreover, these particularized considerations are said to assume extraordinary importance when, as in this case, the information forming the core of the publication by its nature is not available to the public generally and is obtainable only from governmental employees who are under a duty not to reveal it to outsiders.[8] On the basis of these considera-

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[8] The reporter freely admits and positively asserts that certain key information used in preparation of the article was "leaked" to him by anonymous governmental employees. The mayor contends

tions, the mayor advanced arguments in the District Court that it should not reach the defense motion for summary judgment until he was given the opportunity to depose and examine the Federal Bureau of Investigation and Department of Justice employees who supplied Life's reporter with confidential reports and corroboratory materials used in connection with the article. The failure of the District Court to respond favorably to this plea is urged as error here.

These arguments in behalf of compulsory disclosure of confidential news sources, when urged on behalf of a public official whose reputation and integrity have been assaulted on the basis of information supplied by those sources, do not strike us as frivolous. Especially is this so when much of the information supplied by the anonymous informants has been obtained from the private files of Government. Nevertheless, on the facts of this particular case, we believe that in his preoccupation with the

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that the reporter helped himself to confidential information from government files and, in so doing, incited a violation of regulations designated as "*Prescribing Standards of Ethical Conduct for Government Officers and Employees,*" issued by President Johnson under authorization of 3 U.S.C.A. § 301. Exec. Order No. 11,222, 30 Fed. Reg. 6469 (1965) provides in pertinent part, that

> "Section 101. Where government is based on the consent of the governed, every citizen is entitled to have complete confidence in the integrity of his government. Each individual officer, employee, or adviser of government must help to earn and must honor that trust by his own integrity and conduct in all official actions.
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> "Section 205. An employee shall not make use of, or permit others to make use of, for the purpose of furthering a private interest, official information not made available to the general public."

Purloined governmental documents have been before the courts before. See *e.g., New York Times Co. v. United States*, 403 U.S. 713 (1971), and *Dodd v. Pearson*, 279 F. Supp. 101 (D. DC 1968). Compare *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489 (CADC 1968).

identity of Life's news sources, the mayor has overlooked the central point involved in this appeal: that the depositions and other evidentiary materials comprising this record establish, without room for substantial argument, facts that entitled both defendants to judgment as a matter of law, *viz.*, that, quite apart from the tactics employed in collecting data for the article, the mayor has wholly failed to demonstrate with convincing clarity that either defendant acted with knowing or reckless disregard of the truth.

We are aware of the prior cases holding that the First Amendment does not grant to reporters a testimonial privilege to withhold news sources.[9] But to routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that underlay the line of cases articulating the constitutional restrictions to be engrafted

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[9] The weight of decisional authority so holds. See *e.g., Garland v. Torre*, 259 F.2d 545, 548-9 (CA2 1958), certiorari denied, 358 U.S. 910; *State v. Buchanan*, 436 P.2d 729 (Ore. 1968), certiorari denied, 392 U.S. 905; *In re Taylor*, 193 A.2d 181 (Pa. 1963); and *In re Goodfader*, 367 P.2d 472 (Haw. 1961). See also, *Adams v. The Associated Press*, 46 F.R.D. 439, 440-41 (SD Tex. 1969); *Application of Cepeda*, n.5, supra; *Brewster v. Boston Herald-Traveler Corp.*, 20 F.R.D. 416 (D. Mass. 1957); and *Rosenberg v. Carroll In re Lyons*, 99 F.Supp. 629 (SDNY 1951). But see *In re Grand Jury Witnesses*, 322 F.Supp. 573, 576-78 (ND Cal. 1970).

In two recent cases, however, it has been held that a libel defendant's refusal to reveal the identity of its news sources need not bar the entry of summary judgment in its favor. *Konigsberg v. Time, Inc.*, 312 F.Supp. (SDNY 1970), and *Cerrito v. Time, Inc.*, 302 F.Supp. 1071 (ND Cal. 1969), *aff'd per curiam*, 449 F.2d 306 (CA9 1971). Implicit in each of these cases is tacit approval of the contention that the free flow of news obtainable only from anonymous sources is likely to be deterred absent complete confidentiality. Hence, each court seemed to reason that, absent a positive showing of relevance or materiality, a newsman need not divulge the identity of his confidential news informants.

Finally, in *Branzburg v. United States*, 406 US .... 92 S.Ct. 2646, 33 L.Ed.2d 626, (*Caldwell v. United States*) (1972), the

upon the enforcement of State libel laws.[10] Such a course would also overlook the basic philosophy at the heart of the summary judgment doctrine.

III

Some twenty years ago, this court, in *Traylor v. Black, Sivalls & Bryson, Inc.*, 189 F.2d 213 (CA8 1951), set forth the general policy of the circuit with regard to the entry of summary judgment. There it was said that:

> "A summary judgment upon motion therefore by a defendant in an action should never be entered except where the defendant is entitled to its allowance beyond all doubt. To warrant its entry the facts conceded by the plaintiff, or demonstrated beyond reasonable doubt to exist, should show the right of the defendant to a

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Supreme Court was asked to address the constitutional aspects of grand jury efforts to acquire from professional journalists information about possible law violations committed by their news source. See *Caldwell v. United States*, 434 F.2d 1081 (CA9 1970), certiorari granted, 402 U.S. 942; *In re Pappas*, 226 N.E.2d 297 (Mass. 1970), certiorari granted, *ibid.*; and *Branzburg v. Hayes*, 461 S.W.2d 345 (Ky. Ct. App. 1970), certiorari granted, *ibid.* It was held, over 4 dissents, that a newsman does not possess a First Amendment privilege to refuse to answer relevant and material questions asked during a good-faith grand jury investigation. Noting that "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability," *Id.*, at 5030, the Court declined to exempt newsmen from the general obligation of all citizens "to answer questions relevant to an investigation into the commission of crime." *Ibid.* The Court was not faced with and, therefore, did not address, the question whether a civil libel suit should command the quite different reconciliation of conflicting interests pressed upon us here by the defense.

[10] Indeed, as the Court observed in *Caldwell*, n.9, *supra*, "without some protection for seeking out the news, freedom of the press could be eviscerated." 406 US at ..., 92 S.Ct., at 2656. Similarly, to compel a newsman to breach a confidential relationship merely because a libel suit has been filed against him would seem inevitably to lead to an excessive restraint on the scope of legitimate news-gathering activity.

> judgment with such clarity as to leave no room for controversy, and they should show affirmatively that the plaintiff would not be entitled to recover under any discernible circumstances." 189 F.2d, at 217. (Citations omitted).

Summary judgment, as the foregoing excerpt makes clear, is an extreme remedy to be granted only in those cases where there clearly is no genuine issue to be tried. But its extreme nature does not lighten the burden of a party against whom a motion therefor is interposed. Indeed, Fed. Rules Civ. Proc. Rule 56(e), 28 U.S.C.A., supplies the other side of the proposition recognized in *Black, Sivalls & Bryson.* In pertinent part, it is therein stated:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

This aspect of Rule 56(e) has been followed in prior decisions of this court, both in summary judgment cases generally, *Lundeen v. Cordner,* 354 F.2d 401, 407-08 (CA8 1966), and in First Amendment libel cases in particular, *Hurley v. Northwest Publications, Inc.,* 398 F.2d 346 (CA8 1968), *aff'g per curiam,* 273 F.Supp. 967, 974-75 (D. Minn. 1967). It accords with recent constructions of Rule 56(e) by the Supreme Court, *Adickes v. Kress & Company,* 398 U.S. 144, 153, 160-61 (1970), and *First National Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 288-90 (1968), and it advances the important summary judgment objective of judicially assessing the proof to see where there is a genuine issue for trial.

Applying these rules to the case before us, the compulsory disclosure issue is drawn into clearer focus.

Where there is a concrete demonstration that the identity of defense news sources will lead to persuasive evidence on the issue of malice, a District Court should not reach the merits of a defense motion for summary judgment until and unless the plaintiff is first given a meaningful opportunity to cross-examine those sources, whether they be anonymous or known. For only then can it be said that no genuine issue remains to be tried. Thus, if, in the course of pre-trial discovery, an allegedly libeled plaintiff uncovers substantial evidence tending to show that the defendant's published assertions are so inherently improbable that there are strong reasons to doubt the veracity of the defense informant or the accuracy of his reports, the reasons favoring compulsory disclosure in advance of a ruling on the summary judgment motion should become more compelling. Similarly, where pre-trial discovery produces some factor which would support the conclusion that the defendant in fact entertained serious doubt as to the truth of the matters published, identification and examination of defense news sources seemingly would be in order, and traditional summary judgment doctrine would command pursuit of further discovery prior to adjudication of a summary judgment motion. The point of principal importance is that there must be a showing of cognizable prejudice before the failure to permit examination of anonymous news sources can rise to the level of error. Mere speculation or conjecture about the fruits of such examination simply will not suffice. *Hurley, supra,* p. 974 of 273 F.Supp.

But such is not this case. As the opinion of the District Court makes clear, the record contains substantial evidence indicating that it was over a period of many months that Life's reporter carefully collected and documented the data on the basis of which the article was written and published. In turn, Life's key personnel, including one researcher, four editors and three lawyers, spent countless

hours corroborating and evaluating this data. Once suit was instituted, the mayor was provided with hundreds of documents utilized in preparation of the article. He then deposed virtually every Life employee who possessed any connection whatever with the article's preparation and publication and, with one exception, each affirmed his or her belief in the truth of the article and each gave deposition testimony sufficient to raise a strong inference that there was good reason for that belief.[11] To rebut this evidence, and to support his claim that 4 of the 87 paragraphs conveyed false information, the mayor was content to present little more than a series of self-serving affidavits from himself and from Mr. Sansone, together with other evidentiary materials which framed but a minimal assault on the truth of the matters contained in the four paragraphs. Aside from this evidence, he has not produced a scintilla of proof supportive of a finding that either defendant in fact entertained serious doubts about the truth of a single sentence in the article. Neither has he come forward with competent evidence from which the District Court could reasonably discern the inherent improbability of the matters published. In short, the mayor's proof simply does not meet the standard traditionally required of one against whom a motion for summary judgment is interposed.

We have mentioned long-standing decisions of the Supreme Court making clear that the mayor is obligated to demonstrate with convincing clarity that the materials he alleges to be defamatory were published with knowledge of their falsity or with reckless disregard for their truth. Where, as here, the published materials, objectively

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[11] The single exception is this: one of Life's house counsel testified only that he had authenticated the genuineness of certain Government documents which had come into the possession of Life's reporter. He did not purport to pass on the truth or falsity of these purloined materials. This same employee formerly had served as Chief of the Department of Justice's Organized Crime section.

considered in the light of all the evidence, must be taken as having been published in good faith, without actual malice and on the basis of careful verification efforts, that is, they were published in good faith without regard to the identity of the news sources, there is no rule of law or policy consideration of which we are aware that counsels compulsory revelation of news sources.[12] Neither is there any evidence by which a jury could reasonably find liability under the constitutionally required instructions. When these factors conjoin, the proper disposition is to grant the defense motion for summary judgment.[13] The judgment of the District Court must therefore be affirmed.[14]

Affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

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[12] *Caldwell* makes clear that harassment of the press undertaken not for legitimate reasons is without justification. 406 U.S. ..., 92 S.Ct. 2646 (opinion of Powell, J.). To compel disclosure under the circumstances shown by this record would seem to constitute precisely the harassment *Caldwell* seeks to curb.

[13] Cf. *Thompson v. Evening Star Newspaper*, 394 F.2d 774, 776 (CADC 1968); certiorari denied, 393 U.S. 884; *Markus v. Penn Mutual Life Insurance Co.*, 389 F.2d 538, 545 n.9 (CADC 1967); and *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (CADC 1966), certiorari denied, 385 U.S. 1011.

[14] The result we reach in the instant case is not to be construed as precedent for the proposition that news reporters are free to roam at will through the private papers of Government in search of a news story. We hasten to emphasize that through enactment of the Freedom of Information Act, 5 U.S.C. § 552 (1970), *amending* 5 U.S.C. § 1002 (1964), the Congress has attempted to strike the proper balance between the public's "right to know" and the Government's need for secrecy. We note this Act provides that all Government files are to be made available by publication, or otherwise, unless expressly excepted by one of nine carefully delineated exceptions. As to the exceptions, see § 552(a)(4)(b)(5), (b)(7).

APPENDIX B

JUDGMENT

(Filed July 20, 1972)

Robert C. Tucker, Clerk
United States Court of Appeals
For the Eighth Circuit

Alfonso J. Cervantes,
Appellant,
vs.
Time, Inc., and Denny Walsh,
Appellees.

No. 71-1555.
September
Term, 1971.

Appeal From the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

July 20, 1972

APPENDIX C

MEMORANDUM OPINION

United States District Court,
Eastern District Missouri, Eastern Division
Alfonso J. Cervantes, Plaintiff,

v.

Time, Inc., and Denny Walsh,
Defendants.

No. 70 C 259(1).

Aug. 25, 1971.

* * * * * * *

MEMORANDUM

Meredith, Chief Judge.

This action for libel arises out of an article published in Life Magazine which dealt with the appointment by plaintiff of attorney Morris Shenker as head of the Commission on Crime and Law Enforcement. Plaintiff is the Mayor of the City of St. Louis, Missouri. The case is before the Court on defendants' motion for summary judgment and plaintiff's motion to compel defendant Denny Walsh to testify and reveal the persons who are the sources of his information. Both motions have been briefed, orally argued, and submitted to the Court.

In support of their motion for summary judgment, defendants contend that the article is protected by the First Amendment and that under the doctrine of New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.

2d 686 (1964), and its progeny, recovery cannot be had unless plaintiff can show that the defendants published false and defamatory material with a malicious intent to injure plaintiff by its falsity. Defendants further contend that plaintiff cannot, as a matter of law, meet the burden placed upon him to prove actual malice; that, therefore, summary disposition should be granted to obviate the chilling effect on freedom of the press caused by suits such as this.

Plaintiff contends that the motion for summary judgment is not ripe for decision at this time, because there is an issue of fact as to the truth of specific paragraphs in the article. The plaintiff further contends that there is an issue of fact as to the good faith of author, Denny Walsh, in refusing to reveal his sources, which has a bearing on the malicious intent of defendants, and that, therefore, summary judgment cannot be granted.

[1] Both parties agree that this case is governed by New York Times Co. v. Sullivan, supra. The controlling legal principal that has evolved from the New York Times Co. v. Sullivan case is that where a publisher deals with matters of legitimate public concern, the First Amendment protects him from claims for libel, unless he not only publishes false material, but does so with "actual malice", that is, with knowledge of its falsity or with reckless disregard for its truth or falsity. Monitor Patriot Co. v. Roy, 401 U.S. 265, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971); Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 91 S.Ct. 628, 28 L.Ed.2d 57 (1971); Time, Inc. v. Pape, 401 U.S. 279, 91 S.Ct. 633, 28 L. Ed.2d 45 (1971); St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968); Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967); Garrison v. Louisiana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964); Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970);

Rosenbloom v. Metromedia, Inc., 415 F.2d 892 (3rd Cir. 1969); United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc., 404 F.2d 706 (9th Cir. 1968); Cerrito v. Time, Inc., 302 F.Supp. 1071 (N.D.Cal.1969).

[2, 3] In St. Amant v. Thompson, supra, the Court explained that in cases concerning publications dealing with public figures and matters of public interest, as well as public officials, the plaintiff has the burden of proving malice with convincing clarity, and went on to explain the "reckless disregard" aspect of the actual malice rule:

> "These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."

[4] The activities of organized crime are clearly matters of legitimate public concern and interest. The influence of organized crime and its activities are the subjects of vast expenditures of money and time by all branches of government, thus indicating the interest of the public, as well as the public's right to know and be informed of these activities. Plaintiff's activities in connection with organized crime, plus his being a public official, throw him into the public limelight. As a result, the mantle of constitutional protection covers the article upon which this suit is brought. Therefore, unless the plaintiff can show the requisite "actual malice", defendants are entitled to summary judgment.

The issue of Life Magazine for May 29, 1970, contained an eight-page article entitled "The Mayor, The Mob and

The Lawyer". The article was written by Denny Walsh, an associate editor of Life Magazine and a winner of the Pulitzer Price. The thrust of the article was that plaintiff, as Mayor of St. Louis, is conducting a "two faced" and "phony" fight on crime in the City of St. Louis by appointing attorney Morris Shenker as head of the Commission on Crime and Law Enforcement. The crux of the article is established by the following facts of which plaintiff does not complain or deny: (1) for over twenty years plaintiff and his campaign manager, Anthony Sansone, have been close personal friends; (2) Sansone is the son-in-law of St. Louis "gangster" James Anthony Michaels, Sr.; (3) Morris Shenker is the leading spokesman for organized crime in this country; (4) plaintiff appointed Shenker to head his Commission on Crime; (5) plaintiff, in describing the goals of the Commission on Crime, made no mention of organized crime existing in St. Louis; (6) plaintiff publicly denied the existence of organized crime in St. Louis; (7) the United States Government disclosed the existence of organized crime in St. Louis and sent a special task force to St. Louis for the purpose of dealing with organized crime.

The article then expands on this theme by pointing out plaintiff's personal and business ties with "mob figures in his city" through his relationship with Sansone and Shenker. Sansone, son-in-law of gangster James Anthony Michaels, Sr., is shown to have certain personal and business ties with members of organized crime. Through Sansone, plaintiff is linked to the same gangsters, including Anthony Giardano, who has been described as a leader in organized crime. Specific instances are cited in the article in which plaintiff, together with Sansone, met with these same persons for business or social affairs.

The plaintiff's wealth and business holdings are also discussed in the article, specifically, that plaintiff an-

nounced his intention to avoid a conflict of interest by putting his private business interests in trust. The article points out that the transfer to the trust was illusory, because in many instances it appeared that plaintiff retained his interests in the business.

The last part of the article expands upon Morris Shenker's relations with the nation's top hoodlums and concludes that these relations "go far beyond mere legal representation". The purpose of this part of the article was to substantiate the allegation that the appointment of Shenker to head the Crime Commission made the plaintiff's right on crime a facade so far as organized crime is concerned.

Plaintiff complains of only four of the eighty-seven paragraphs contained in the article. All other paragraphs in the article are either admitted or not denied by plaintiff for purposes of this motion. For convenience, the Court will hereafter refer to the paragraphs as they are numbered on a copy of the article that defendants have filed with the Court. The four paragraphs of which plaintiff complains are numbered 11, 12, 27, and 31.

Paragraph 11 stated that "[t]hrough Sansone, Cervantes has sought and received the counsel of this powerful gang leader [Michaels]. In December 1964, just two days after Cervantes declared his candidacy for mayor, he met with Sansone and Michaels to plan campaign strategy." Reports and exhibits filed by defendants reveal that the information presented in paragraph 11 is substantially contained in detailed F.B.I. reports obtained from the Department of Justice.

Paragraph 12 states that "[t]he following March, after Cervantes had won the primary, Sansone met again with Michaels at Rite Way to talk over Cervantes' prospects for the general election. This time Giardano, the Mafia boss, sat in too." Again, the matters contained in para-

graph 12 are substantially the same as, and corroborated by, a signed, dated report of the Intelligence Unit of the St. Louis Police Department. Although the libelous character of paragraph 12 with regard to plaintiff is unclear, paragraph 12 is substantially corroborated by the police department report.

[5] Paragraph 27 states that Michaels brokered insurance with the Cervantes agency. This statement is corroborated by two facts: (1) Michaels listed the Cervantes agency on his application for renewal of his broker's license, and (2) T. B. Stegman, head of the broker's section of the Division of Insurance, wrote a letter to George H. Heckman, president of Cervantes and Associates, Inc., in which he assumed that Michaels had brokered insurance through the Cervantes agency. The letter requested the agency to verify and furnish a transcript of this business to the Missouri Division of Insurance. The reply given by Heckman was that: "We have nothing for this man at present. Understand that he wants to broker business with us." From these documents and the reasonable inferences arising therefrom, the defendants could have reasonably concluded that Michaels brokered insurance with the Cervantes agency. Paragraph 27 does not constitute such an error of interpretation so as to rise to a level of reckless disregard of the truth. See Time, Inc. v. Pape, 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed.2d 45 (1971).

Paragraph 31 states that plaintiff acted as bartender to the royalty of organized crime by serving drinks at Sansone's home following the funeral of Mrs. James Michaels, Sr. This paragraph is substantiated by an official F.B.I. report obtained from the Department of Justice by defendant Walsh.

[6] The Court finds that the corroboration of the paragraphs in dispute, coming from highly trustworthy reports

and documents, based upon police or F.B.I. investigations, is sufficient to negate malice. Whether true or untrue, paragraphs 11, 12, 27, and 31 are based upon substantial and credible reports and information. The paragraphs are not, as plaintiff contends, fabrications of the defendants with no substantial corroboration. The conduct of the defendants in printing these paragraphs was not highly unreasonable and did not constitute an extreme departure from the standards of investigation and reporting ordinarily adhered to by a responsible publisher. Defendant Time, Inc., additionally checked and verified the reports in such a manner that it had every reason to believe the truth of the statements contained in the reports. Plaintiff has wholly failed to establish "actual malice" or reckless disregard for the truth on the part of the defendants.

A fair reading of the entire eighty-seven paragraph article convinces this Court that the four paragraphs complained of here have little or no impact on the total article. In context, the four paragraphs are a minute and relatively ineffective portion of the article as a whole. In any event, the Court finds that paragraphs 11, 12, 27, and 31 of the article were published without malice and with due regard for the truth.

[7, 8] The depositions and biographical references file make it clear that defendants had no knowledge of falsity, no serious doubt concerning the truth of any statement in the article, and certainly no reckless disregard of whether or not statements in the article were false. Plaintiff has failed to produce or raise any issue as to actual malice on the part of the defendants. Furthermore, the issue of defendant Denny Walsh's good faith in not revealing his sources has no bearing on the malicious intent of the defendants under the facts of this case. Plaintiff has failed to present any evidence beyond his mere conclusionary affidavits, which would enable this Court to conclude that

defendant Time's asserted failure in requiring Walsh to disclose the identity of his sources was motivated by malice or reckless disregard. It should be emphasized that plaintiff must have proof, not mere allegation or conjecture in a libel case. As stated in Hurley v. Northwest Publications, Inc., 273 F. Supp. 967 (D. Minn. 1967), affirmed 398 F.2d 346 (8th Cir. 1968):

> "A mere chance that somehow, somewhere, on cross-examination or otherwise plaintiffs will uncover something which might add to their case but obviously of which now they have no knowledge, is mere speculation and conjecture and is not sufficient in view of the showing made here by the defendant." Id. at 974.

Accordingly, defendants' motion for summary judgment will be granted.

Plaintiff's motion to compel Walsh to reveal his sources will not be considered by the Court in view of the fact that the motion for summary judgment is being granted by the Court.

APPENDIX D

ORDER
OF
United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 71-1555. September Term, 1971

Alfonso J. Cervantes, Appellant,
vs.
Time, Inc. and Denny Walsh, Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing also be, and it is hereby, denied.

August 17, 1972

APPENDIX E

ORDER
OF
United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 71-1555. September Term, 1971

Alfonso J. Cervantes, Appellant,

vs.

Time, Inc. and Denny Walsh, Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

On Consideration of the motion of appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate of herein be, and the same is hereby, stayed for a period of ninety days from and after this date, and if within said period of ninety days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

August 24, 1972